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Nos. 88-515 and 88-525

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
Cross-Appellant

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

On Appeal from the United States District Court for the Central District of California

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BRIEF OF AMICUS CURIAE, PACIFICA FOUNDATION IN SUPPORT OF APPELLANT/CROSS-APPELLEE

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INTEREST OF AMICUS CURIAE

Pacifica Foundation, Inc. is a non-profit corporation organized in 1946 under the laws of the State of California for purposes which include the following:

> (c) . . . to encourage and provide outlets for the creative skills and energies of the community; to conduct classes and workshops in the writing and producing of drama; to establish awards and scholarships for creative writing; to offer performance facilities to amateur instruments, choral groups, orchestral groups and music students; and to promote and aid other creative activities which will serve the cultural welfare of the community.
>
> (d) . . . to engage in any activity that shall contribute to a lasting understanding between nations and between the individuals of all nations, races, creeds and colors; to gather and disseminate information on the causes of conflict between any and all of such groups; and through any and all means compatible with the purpose of this Corporation, to promote the study of political and economic problems and of the causes of religious, philosophical and racial antagonisms.
>
> (e) . . . to promote the full distribution of public information; to obtain access to sources of news not commonly brought together in the same medium; and to employ such varied sources in the public presentation of accurate, objective, comprehensive news on all matters vitally affecting the community."

Pacifica is the licensee of six noncommercial educational FM broadcast stations: KPFA and KPFB, Berkeley, California; KPFK, Los Angeles, California; KPFT, Houston, Texas; WBAI, New York, New York; and WPFW, Washington, D.C. Pacifica also operates an international news service and a 30,000 tape archive which distribute programming to noncommercial radio stations across the nation. Pacifica has pioneered the

field of listener-supported, commercial-free broadcasting since KPFA went on the air on April 15, 1949.

Pacifica's corporate purposes have been implemented by making its stations a forum for thought-provoking programs of artistic, cultural, and political significance. The many celebrated writers, musicians, and social commentators who were first broadcast on a Pacifica station include: William Carlos Williams, Langston Hughes, John Cage, Pierre Boulez, Philip Glass, John Coltrane, Aldous Huxley, Jean Renoir, Bob Dylan, Pauline Kael, I.F. Stone, Malcolm X, Caspar Weinberger, Barry Commoner, Germaine Greer, Alice Walker, and Martin Luther King, Jr. In addition to regularly scheduled news and public affairs programs, Pacifica provides in-depth coverage of contemporary events of great public interest. For example, Pacifica provided gavel-to-gavel coverage of the Iran-Contra Congressional hearings and the hearings on the nomination of Mr. Robert Bork to be a Justice of this Court.

Pacifica's "provocative programming" has often been made the subject of petitions to deny Pacifica licenses. *See*, e.g. *Pacifica Foundation (KPFA)*, 1 Rad Reg. 2d (P&F) 747, 750 (1964), where the Federal Communications Commission conducted an inquiry into complaints regarding readings from the works of Edward Albee, Lawrence Ferlinghetti, Edward Pomerantz, and Robert Creeley (the inquiry discussed the "error" of airing the Ferlinghetti and Creeley programs in renewing the broadcast licenses of KPFA and KPFB); and *Pacifica Foundation (WPFW)*, 95 FCC 2d 750 (1983), where the FCC considered and denied complaints alleging, *inter alia*, that WPFW had failed to present balanced coverage of a variety of issues, including U.S. involvement in El Salvador, U.S. development of nuclear weapons, the Air Traffic controller's strike, and abortion.

Pacifica has also been accused of airing "indecent" material. One such complaint led to this Court's decision

in *FCC v. Pacifica Foundation*, 438 U.S. 726, *reh. den.*, 439 U.S. 883 (1978), where a sharply divided Court upheld the FCC's narrow authority to "channel" the "repetitive, deliberate use" of broadcast material referring to sexual or excretory activities in a patently offensive manner. The instant case raises questions of whether the authority affirmed in *Pacifica* remains valid, and whether that authority may be substantially expanded and applied to non-broadcast media. Pacifica's experience with the Commission indecency standard is uniquely relevant to these questions.

For the nine years following *Pacifica*, the FCC applied an indecency standard that channelled indecent language —pragmatically defined as the seven words at issue in *Pacifica*—to hours after 10:00 p.m. On April 29, 1987, the Commission issued three rulings and a public notice which dramatically enlarged the scope of that long-standing policy. *Pacifica Foundation, Inc. (KPFK)*, 2 FCC Rcd 2698 (1987); *Regents of the University of California*, 2 FCC Rcd 2703 (1987); *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987); *New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd 2726 (1987). Under the new standard established by these rulings, the Commission defined indecency as "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Enforcement Standards*, 2 FCC Rcd at 2726, citing the "generic" definition set forth in *Pacifica Foundation (WBAI)*, 56 FCC 2d 94 (1975), *recon. denied*, 59 FCC 2d 892 (1976), *rev'd*, *Pacifica Foundation v. FCC*, 556 F.2d 9 (1977), *rev'd*, *FCC v. Pacifica Foundation*, 439 U.S. 726 (1978), *supra*. The definition of indecency was expanded to include visual images as well as words, and "innuendo or double entendre" as well as literal references to sexual or ex-

cretory activities or organs. 2 FCC Rcd at 2706. Broadcast of any material which was "indecent" under the new definition was initially considered actionable if the broadcast occurred when there was a "reasonable risk" that children might be in the audience. 2 FCC Rcd at 2726.

On reconsideration, the Commission discussed and reaffirmed its expanded definition of indecency. *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987). As the constitutional principle governing its standards, it stated that "we may only do that which is necessary to restrict children's access to indecent broadcasts; we may not go further so as to preclude access by adults who are interested in seeing or hearing such material." 3 FCC Rcd at 931. It nonetheless indicated that the "merit" of the material broadcast was only "one of many variables" and would not, in and of itself, immunize an otherwise actionable broadcast. *Id.* at 932. The "contemporary community standards" to be applied would be determined by reference to what the FCC Commissioners believed the average broadcast viewer or listener would find patently offensive. *Id.* at 933. The prohibition against indecent broadcasts when there was a reasonable risk that children would be in the audience was modified in light of the Commission's conclusion that such a standard would amount to "an effective ban" which would "be contrary to current law that indecent but not obscene material can be restricted but not banned," *Id.* at 934, n.47, citing *Pacifica*, 438 U.S. at 757-61. The Commission stated its "current thinking" that it would be reasonable to expect that children would not be in the audience after midnight. *Id.*

The Commission's indecency standard remains in flux. After finding that the generic definition of indecency resulted in uncertainty for broadcasters, the United States Court of Appeals for the District of Columbia Circuit upheld the definition in light of *Pacifica*, but found no

rational basis for channeling all indecent material until after midnight. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Congress, meanwhile, in the "Helms Amendment," Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988), instructed the Commission to institute a 24-hour per day ban on indecency. The FCC implemented such a regulation. *Broadcast Services, Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. § 1464 on a Twenty-Four Hour Per Day Basis*, 53 Fed. Reg. 52425 (Dec. 28, 1988). The Circuit Court stayed the effectiveness of that regulation. *Action for Children's Television v. FCC*, No. 88-1916 (D.C. Cir. filed Dec. 30, 1988, stay granted Jan. 23, 1989). The Government in the instant case advocates a position which would compound the uncertainty now surrounding indecent broadcasts by exporting that standard to a non-broadcast medium.

The Commission's new definition of indecency has had a real—not merely a theoretical—chilling effect on Pacifica's programming.[1] Under the new indecency policy, Pacifica has been censured for discussing excerpts of a play which had extended theatrical runs in Los Angeles and New York and has won critical acclaim from the *New York Times, Pacifica Foundation, Inc. (KPFK)*, 2 FCC Rcd 2698 (1987), and has been informally criticized for other programming decisions. While the Commission declined to issue a declaratory ruling on the question whether a reading from James Joyce's novel *Ulysses* on Pacifica's New York station, WBAI, would be actionable under the new policy[2], individual Commis-

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[1] Pacificia's recent experiences are described in more complete detail in a forthcoming law review article. Crigler and Byrnes, "Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy," 38 Cath. U. L. Rev. —— (No. 2, Winter, 1989).

[2] Letter from James C. McKinney, Chief, Mass Media Bureau, FCC to Counsel for Pacifica (June 5, 1987). Commission staff

sioners publicly expressed doubts as to the literary merit of *Ulysses* and its suitability for broadcast.[3]

As a result of the new indecency policy, Pacifica has reluctantly declined to broadcast readings from the works of Allen Ginsberg[4], William Burroughs, Woody Guthrie, and Grace Cavaleri. It has cancelled or censored health programs and programs directed at a gay or lesbian audience. And it has suppressed musical selections ranging from classic blues artists to contemporary musicians such as Gil Scott Heron and John Lennon. Recently, it deleted portions of a reading of *The Satanic Verses* by Salman Rushdie. Thus, the practical effect of the current definition of "indecency" has been to constrain or silence one of the foremost outlets for literary, artistic and social expression in the country.

SUMMARY OF ARGUMENT

The narrow exception to *Miller v. California*, 413 U.S. 15 (1973), carved out in *Pacifica* should not be extended. Extension of the *Pacifica* exception to cable television and to mass mailings has already been rejected. The factual premises upon which that narrow exception were originally predicated do not apply to telephone services, and, indeed, no longer apply to broadcast services. The criteria used to justify the exception are no longer valid. The assumption embraced by *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), that broadcasting is en-

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subsequently denied a listener complaint against the broadcast of *Ulysses*, not because the work was deemed to be "decent," but because the listener had failed to submit a tape or transcript of the broadcast. Letter from Alex D. Felker, Chief, Mass Media Bureau, FCC to Thomas Byrne (April 7, 1988). It simply ignored the fact that Pacifica had previously supplied the Commission with the text of the relevant part of *Ulysses*.

[3] Davis, "(Bleep) (Bleep) (Bleep) And Yes I said Yes I Will Say Yes," *Wall Street Journal* (May 26, 1987), p. 35, col. 1.

[4] *New York Times* January 6, 1988, Section C, page 22.

titled to only attenuated First Amendment protection on account of spectrum scarcity has been rejected by the FCC itself. The number, variety, and availability of communications media have increased so dramatically over the past decade that no medium can any longer be claimed to be *uniquely* pervasive or *uniquely* accessible to children.

Nor can the *Pacifica* exception be extended from the limited channeling of constitutionally protected speech to a complete ban of that speech. *Pacifica* was not designed to permit the Government to displace parents from the role of supervising the listening and viewing habits of their children.

ARGUMENT

I. THERE IS NO JUSTIFICATION FOR DEPARTURE FROM THE STANDARD ESTABLISHED IN *MILLER V. CALIFORNIA*

A. There Is No Basis for Extending the *Pacifica* Exception to the *Miller* Standard to Other Media

Miller establishes a distinction between constitutionally protected speech and constitutionally unprotected speech which was the culmination of many years of deliberation by the Court and successfully balances the Constitutionally protected freedom of speech against any Governmental interest in protecting the public from language found offensive as a result of its sexual content. *Miller* has been deemed to control even when statutes have used, in addition to the word "obscene," similar but broader terms such as "indecent." This Court has held that, where the term "indecent" is used in a federal statute to describe types of expression which might give rise to criminal sanctions, the term must be construed as referring only to "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller v. California*." *Hamling v. United States*, 418 U.S. 87, 114 (1974), quoting *United States*

v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 130 n.7 (1973).

The Second Circuit has applied this principle to the type of telephone service addressed in this proceeding, declaring that: "Were the term indecent to be given meaning other than *Miller* obscenity, we believe the statute would be unconstittuional." *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 560 (1988), *cert denied*, 102 L.Ed 2d 324 (1988). The Government fails to adduce any persuasive reasons as to why the *Miller* standard is an inadequate basis for addressing the services at issue.

The Government seeks a major enlargement of the scope of the narow exception to *Miller* made in *FCC v. Pacifica Foundation*, 438 U.S. 726, *reh. den.*, 439 U.S. 883 (1978). It seeks to detach the *Pacifica* exception from the specific assumptions with respect to the nature of the media upon which it was predicated and give it an independent life apart from those factors. It seeks to extend the exception from the one medium to which it was applied and make it applicable to other media as well. It seeks to metamorphosize the exception from channeling into outright banning.

The Government plays down the highly limiting factors involved in *Pacifica* in its effort to extend it to the medium of telephone information or "976" services. In doing so, moreover, it is attempting to expand the theoretical basis for the *Pacifica* exception, so that it can be reapplied to the broadcast medium in a way that would further reduce the First Amendment protection afforded broadcasters and members of the larger public seeking to find broadcast outlets for their work. The Commission has argued that the Court's opinion in this case is relevant to an appeal of an FCC decision to ban the broadcast of indecent material on a 24-hour-a-day basis.[5]

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[5] FCC Motion to Hold Case in Abeyance of February 2, 1989, p. 2, *Action for Children's Television v. FCC*, No. 88-1916 (D.C.

Pacifica is the broadcaster one of whose programs was at issue in the Court's 1978 decision. While Pacifica has no interest in the type of "976" service at issue in the decision below, it is deeply concerned with the attempt to enlarge the narrow exception made in the Court's 1978 decision into something vastly larger.

Implicit in much of what the Government is saying now is that the broadcast medium is no longer "unique," as the Court believed it was in 1978. On this basis, the Government seeks to justify extension of the *Pacifica* exception to additional media. Pacifica agrees that the broadcast medium is not nearly so special as the Court believed it was in 1978. The implication to be drawn from that fact, however, is that the *Pacifica* exception should no longer be treated as valid limitation on the First Amendment protections afforded to the broadcast medium—not, as suggested by the Government, that it be extended to other media as well.

The Court's finding in *Pacifica* that an exception to the *Miller* standard was justified depended upon the conjunction of the three following conclusions about the nature of the broadcast medium, as the Court perceived it in 1978, 438 U.S. at 748-49:

(1) the belief that broadcasting should receive the most limited form of First Amendment protection on the basis of the distinction as to the scarcity of broadcast frequencies made in *Red Lion*,

(2) the uniquely pervasive presence of broadcasting, especially with respect to homes, and

(3) broadcasting's unique accessibility to children.

The common theme of each of these points is the perceived uniqueness of the broadcast medium. In quoting

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Cir. filed Dec. 30, 1988, stay granted Jan. 23, 1989). The motion was filed after the court of appeals had stayed the agency decision under review.

its ruling in *Pacifica*, in *Bolger v. Youngs Drug Products*, 463 U.S. 60, 74 (1983), the Court highlighted the repeated use of the word "uniquely." The *Pacifica* ruling has been extended to no other media.

The Government is now, in essence, saying that broadcasting is not unique after all. When the Government states, for example at page 27 of its Brief, that: "Like radio and television, the telephone is a technological means of distributing messages into the home that is *uniquely* accessible to children'" (emphasis added), it is engaging in a contradiction of terms. The various media cannot all be "uniquely" pervasive, accessible, or scarce. The inference to be drawn is that the broadcast medium is not the unique medium the Court was told it was in 1978.

The Government ignores the fundamental premise of the Constittuional portion of the *Pacifica* opinion, the principle, articulated in *Red Lion*, that broadcasting was a medium subject to a lesser degree of First Amendment protection than other media. Now, on the assumption that the 1978 conclusion is still valid even in the absence of the scarcity rationale, the Government seeks to extend its reach substantially beyond what was contemplated in 1978. In effect, the Government wants the fruit to grow even after the tree's roots have been severed.

B. The Scarcity Rationale for Diminished First Amendment Protection Has Become of Suspect Validity Even for Broadcasters and Is Certainly Not Applicable to Other Media

In its 1975 decision affirmed in *Pacifica*, the Commission relied upon scarcity of spectrum space as one of the distinct bases to support its position that broadcasters were entitled only to attenuated First Amendment protection. *Pacifica Foundation (WBAI)*, 56 FCC 2d at 97 (1975). The Commission specifically relied upon the Court's decision in *Red Lion* for the proposition that

the broadcast medium is fundamentally different from other modes of communication and expression. Para. 8.

Part IV-C of the Court's opinion affirming the FCC decision, the only part of the opinion on the Constitutional issue joined by five members of the Court, begins its analysis with the proposition that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." 438 U.S. at 748. The authority relied upon for this proposition was the disparity of treatment between broadcasters and newspapers provided in the contrasting decisions of *Red Lion* and *Miami Publishing v. Tornillo*, 418 U.S. 241 (1974).[6]

The critical dependency of *Pacifica* upon the *Red Lion* rationale for diminished First Amendment protection for broadcasters was underscored five years later in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). Observing, at 74, that: "Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication" and citing *Red Lion*, the Court concluded that *Pacifica* could not be extended to direct mail solicitations. Even before *Bolger*, the Court had distinguished broadcasting and the mailing of messages on the basis

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[6] Additional cases cited in Justice Powell's concurring opinion (438 U.S. at 759) don't add to the rationale set forth in *Red Lion*. *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977), merely cross references *Capital Broadcasting Co. v. Mtichell*, 333 F. Supp. 582 (D.C. Cir. 1971), *aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972). That District Court decision upholding the statutory ban on commercial speech advertising cigarettes was predicated on the belief that "Congress has the power to prohibit the advertising of cigarettes in *any media*." *Id.* at 584 (emphasis added). *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973) simply follows the reasoning of *Red Lion* that the scarcity of broadcast spectrum justifies attenuated First Amendment protection.

of scarcity. In *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 542-43 (1980), it found that communicating through billing envelopes differs from the use of broadcast frequencies in that the broadcaster communicates "through use of a scarce publicly owned resource."

In distinguishing cable television from broadcasting under *Pacifica*, the Tenth Circuit gave, as the first reason why broadcast has received the most limited First Amendment protection, the "physical scarcity of broadcast frequencies." *Jones v. Wilkinson*, 800 F.2d 989, 999 (10th Cir. 1986), *aff'd sub nom. Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.). The Ninth Circuit found also that "[t]he Supreme Court's determination to allow greater government intrusion into the affairs of broadcasters rests on the physical scarcity of radiowaves." *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1403 (9th Cir. 1985), *aff'd sub nom. City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

In invalidating a statute forbidding Pacifica to editorialize, *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), the Court assumed the existence of scarcity as a predicate for broadcast regulation: "The fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants.'" 468 U.S. at 377. Even then a restriction on speech, the Court found, must be "narrowly tailored" to further a substantial governmental interest. It treated *Pacifica* as "consistent with the approach taken in our other broadcast cases," such as *Red Lion*, 468 U.S. at 380, n.13, and cited *Pacifica* as an example of the critical examination required in light of the particular circumstances of each case. 468 U.S. at 381.

The Court recognized, however, that the scarcity rationale has been becoming increasingly questionable.

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. . . . We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

League of Women Voters, 468 U.S. at 376, n.11 (1984).

Since that time, the Commission has given a loud and clear signal that the time has come to reconsider broadcast regulation premised upon the scarcity rationale. It has disavowed the entire scarcity rationale underlying the Court's conclusions in *Red Lion. Syracuse Peace Council*, 2 FCC Rcd 5043, 5054-57 (1987), *aff'd on other grounds, Syracuse Peace Council v. FCC*, No. 87-1516, D.C. Cir., decided February 10, 1989, WL 9226.

The Commission studied the scarcity it had previously used as the predicate for a variety of regulatory actions and found that such scarcity no longer existed. *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 145 (1985). The Commission found that alternative media to broadcasting, including cable, video cassette recorders, low power television, multichannel multipoint distribution, and other electronic media, had proliferated. 102 FCC 2d at 208-217. Building on those detailed findings of fact concerning the changing nature of the industry, the Commission concluded that no "scarcity rationale justifies differential First Amendment treatment of the print and

broadcast media." *Syracuse Peace Council*, 2 FCC Rcd at 5054. The Commission concluded that:

> . . . an evaluation of First Amendment standards should not focus on the *physical differences* between the electronic press and the printed press, but on the *functional similarities* between these two media and upon the underlying values and goals of the First Amendment. We believe that the function of the electronic press in a free society is identical to that of the printed press and that, therefore, the constitutional analysis of government control of content should be no different.

Syracuse Peace Council, 2 FCC Rcd at 5055. The Commission said it failed to see how the people's right to receive ideas unfettered by government interference "changes when individuals choose to receive ideas from the electronic media instead of the print media." *Syracuse Peace Council*, 2 FCC Rcd at 5043. Recently, the Commission has explicitly disavowed its earlier reliance upon the scarcity rationale to sustain action with respect to the broadcast of alleged indecency. *Pacifica Foundation (KPFK)*, 2 FCC Rcd 2698, 2699 (1987), *reconsideration sub nom. Infinity Broadcasting Corp.*, 3 FCC Rcd 930, *reversed in part, Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

The courts have recognized that in the absence of a spectrum scarcity rationale upon which to premise a more limited degree of First Amendment protection, there is no basis for departing from the general standard established in *Miller*. Speech transmitted by cable TV, a number of lower courts have held, may not be regulated under *Pacifica*. *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah, N.D. 1982); *Home Box Office Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah, C.D. 1982); *Cruz v. Ferre*, 571 F. Supp. 125 (S.D. Fla. 1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985); *Community Television v. Wilkinson*, 611 F. Supp. 1099 (D. Utah, C.D. 1985), *aff'd sub nom. Jones v. Wil-*

kinson, 800 F.2d 989 (10th Cir. 1986), *aff'd sub nom. Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.). The lack of scarcity with respect to cable has been a prominent distinction cited between cable and broadcasting. In response to an argument by Morality in Media, that cable and broadcast are both "scarce media," it was ruled that "cable is not limited to a finite number of channels the way broadcasting is . . . . the number of additional channels, in a technical sense, is subject to extensive expansion." *Community Television v. Wilkinson*, 611 F. Supp. at 1113. "If one turns it on, cable provides a larger number of channel and subject choices than does broadcast." *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1168 (D. Utah, N.D. 1982). "[T]he public airways are crowded and their available use allocated by the FCC. In a sense, the FCC has made the subscription choice for the viewer." *Id.* at 1169.

At the present time, the majority of households in America receive television service not through reception of a signal over the air but instead through cable television systems.[7] This percentage is continuing to grow rapidly. In essence, the universe of available broadcast services is increasingly not the relatively small number of options available from over-the-air broadcast stations using the limited electromagnetic spectrum, but the much larger and more open-ended number of options available through local cable distribution systems.

The once sharp dichotomy between print media (under *Tornillo*) and electronic media (under *Red Lion*) has broken down. USA Today, the Wall Street Journal, and the New York Times, for example, are now distributed by satellite.[8] They therefore use the electromagnetic

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[7] 54.8% of TV households now subscribe to cable television services. *Broadcasting*, March 13, 1989, p. 14.

[8] *See, e.g.*, the 1988 Annual Report of Gannett Co., Inc., p. 57, the 1987 Dow Jones Annual Report, "Operating Services," and the 1981

spectrum as a part of their distribution systems. Their use of the spectrum is, in fact, greater than that of the local broadcaster since they use the spectrum over the entire country and other parts of the globe covered by the satellite's beam and not merely in the much smaller geographical area covered by a terrestrial broadcast station.

Since 18 U.S.C. § 1464, the statute addressed in *Pacifica*, covers, by its terms, not only broadcasts but any communication by transfer of electrical energy, the statute, under the Government's reading of the law, could apply to alleged indecency against those newspapers or any others using the spectrum to transmit their editorial product. Furthermore, since the new 47 U.S.C. § 223(b) addressed here applies, by its terms, to any use of the telephone to communicate for commercial purposes, and newspapers use the satellite services of communications common carriers, newspapers come within the scope of the statute. Such a result is clearly prohibited under the Court's vindication of the First Amendment rights of newspapers in *Tornillo*. Indeed, the absurdity of the Government's refusal to accept First Amendment limitations on the literal reading of these statutes is illustrated by the fact that this reading threatens telephone services such as Westlaw or Lexis which transmit putatively indecent materials in decisions of courts or of the FCC.

C. None of the Electronic Media Have a Uniquely Pervasive Presence

In the absence of the scarcity of broadcast frequencies found in *Red Lion*, the remaining two criteria are not reliable bases for departing from *Miller* standards. In *Roy City*, 555 F. Supp. at 1170 (D. Utah, N.D. 1982), the court recognized that pervasiveness alone might not furnish a fundamental basis for legal distinction. "The

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Annual Report of the New York Times. In addition, other newspapers use the electromagnetic spectrum in terrestrial microwave links.

Court finds great difficulty in distinguishing (other than popcorn) between going to the movies at a theatre and having the movies come to me in my home through electronic transmission over wire. . . . There is no distinction made with the *Miller* standard as to whether one goes to the movies or prefers to have the movies come into one's home."

Pervasiveness is a quality that has come to be shared by a variety of electronic media, including, for example, broadcast, telephone, cable, video casettes, compact discs, and audio casettes. No one of these media can any longer be viewed as *uniquely* pervasive. Even when added together, the sum of communications through electronic media is less intrusive than is the accumulation of the routine and persistent use of language by peers in numerous unsupervised places, from schoolyards to bus stops. Perhaps, the putative relevance of pervasiveness to the question of First Amendment protection has been tacitly assumed to lie in the fact that the state can control a relatively small number of speakers through a limited number of media outlets in a way that it could not effectively control the numerous speakers expressing themselves through other means. The number of speakers, however, has grown enormously as the electronic media have proliferated. There has been an unfortunate tendency to question First Amendment values each time a new medium appears and begins to provide a mechanism for a significant amount of communication. The medium does not, however, change the fundamental nature of communications. Constitutional values are enduring ones that should not change with the introduction of each new mechanism for communications.

D. None of the Electronic Media is Uniquely Accessible to Children

While it is patently true that communications of all kinds are becoming more directly available in the home, that is simply a part of one of the fundamental social

transformations of the current generation. The fact that a movie may be seen at home, whether by conventional broadcast transmission, cable, video tape, or direct satellite reception, in no way makes it more dangerous to the young. The fact that a song lyric may be heard on the radio, on record, cassette, compact disc, or the telephone rather than at a concert or on the street makes it no more dangerous to the young. Quite the opposite, by being brought into the home it becomes more subject to parental control. It permits parents to make better informed and more effective judgments about what a particular child of a given age and state of development should or should not be permitted to see or hear. It permits parents to make such judgments as individuals rather than surrendering their role to such bodies as the appointees to the Federal Communications Commission or a jury in Salt Lake City. It helps avoid the danger discussed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), of Governmental usurpation of the parent's role.

The intrusiveness that should be of concern is the proposed Governmental intrusiveness into what people see and hear in their homes. A great many people want the proliferating variety of electronic services which are becoming available. The implication of the proposed censorship is that the Government should prevent the public from receiving these services. The basic responsibility for controlling children is that of parents. If parents believe that certain material is not appropriate for their children, it is their individual responsibility to take steps to control their children's practices. If they are unwilling to do so, the inference may properly be drawn that the matter is not one parents care about all that much. The Government has no right to usurp the role of parents and suppress speech that parents themselves do not suppress and, in fact, willingly receive.

Since 1978, the range of controls available to parents over the use of broadcast media by their children has

grown. Since most television broadcasts are now seen over cable systems, broadcast materials have become subject to the same lock box features of cable systems discussed in *Community Television v. Wilkinson*, 611 F.2d at 1112. Even aside from cable controls, television receivers are now sold with lockout features that can be programmed by parents to restrict their children's viewing if they desire. While access by children to any medium of communication can probably not be totally avoided, the *unique* degree of access that concerned the Court in 1978 no longer exists. Instead, an increasingly large array of media are accessible. None of these media has a role that can any longer be viewed as unique.

The lack of unique accessibility to children is illustrated by the fact that, when the proponents of the Helms Amendment, which bans broadcast "indecency" on a 24-hour a day basis sought some justification for protecting children in the wee hours of the morning, the only rationale they could find was the possibility that children might use VCR recording machines and programmable tape decks to record such broadcasts and listen to them later. Remarks of Senator Helms, 134 Cong. Rec. S9912 (July 26, 1988) and Remarks of Representative Dannemeyer, 134 Cong. Rec. H7563 (Sept. 14, 1988). The same material may be more readily available from a video rental shop or from a tape borrowed from a friend. The point is that, under the analysis made by the proponents of the Helms Amendment, the pervasive medium is not the broadcast medium. It is the VCR medium.

The list of purportedly "unique" media that proponents of censorship would like to censor grows increasingly large. Efforts to create an ever expanding list of "unique" media, however, merely underscores the fact that there is no longer any medium of unique pervasiveness and intrusiveness—and therefore no basis for any exception to the generally applicable standard the Court established in *Miller*.

II. EVEN IF *PACIFICA* WERE APPLICABLE, THERE WOULD BE NO BASIS FOR A COMPLETE BAN

Offensive speech is protected by the First Amendment. *Cohen v. California*, 403 U.S. 15, 23 (1971). In *Pacifica*, Justice Stevens noted that "indecent" speech is "not entirely outside the protection of the First Amendment." 438 U.S. at 746. Justice Powell treated the afternoon monologue as "offensive but protected speech," and emphasized that the Court's opinion did not prevent Pacifica from broadcasting it during late evening hours. *Id.* at 759-760. Justice Brennan observed the Court's "unanimous agreement that the Carlin monologue is protected speech." *Id.* at 763.

The Court contemplated nothing more than a channeling of the speech. In its 1975 decision, the FCC had embraced the concept of "*channeling*" as opposed to an outright ban. *Pacifica Foundation (WBAI)*, 56 FCC 2d at 98 (emphasis in original). The Court's opinion emphasized that the decision rested on a "nuisance rationale." 438 U.S. at 750. Justice Powell observed that the Commission had sought to "channel" the program "to hours when the fewest unsupervised children would be exposed to it." 438 U.S. at 757.

The FCC initially treated *Pacifica* as a very narrow decision largely limited to a set of unusual facts. Two weeks after the decision, the Commission's Chairman told an audience "the circumstances of WBAI's broadcast are about as likely to occur again as Haley's Comet."[9] The Commission declared:

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[9] Wing, *Morality and Broadcasting: FCC Control of 'Indecent' Material Following Pacifica*, 31 Fed. Comm. L.J. 145, 169 (1978-79). The author, Susan Wing, observed at 171 that, despite the FCC's initially restrained treatment:

> An administrative agency—even an independent agency such as the FCC—in which decisions are made by political appointees with terms of limited duration, is likely to be subject to pressures from the executive branch and from Congress. This,

> The Supreme Court's decision in [*Pacifica*] affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding.

WGBH Educational Foundation, 69 FCC 2d 1250, 1254 (1978). It ruled, in particular, that "late evening hours such as are present here in the case of the 11:00 p.m. program are not within the intent of our *Pacifica* decision." *Id.*, n.6.

Even during the last few years, when the FCC has begun a shift toward censorship of media, the FCC has continued to recognize the constitutional limitation against an absolute ban. In 1987, it observed that an "absolute ban on broadcast speech would run afoul of this constitutional premise." *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 931, *reversed in part on other grounds*, *Action for Children's Television v. FCC*, 852 U.S. 1332 (D.C. Cir. 1988).

The D.C. Circuit held, in *Action for Children's Television*, 852 F.2d at 1344, that "[b]roadcast material that is indecent but not obscene is protected by the first amendment." The court found that the sole basis for channeling is to protect unsupervised children. 852 F.2d at 1340. "Government's role is only to facilitate parental supervision of children's listening." 852 F.2d at 1343. It found that "the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished . . . unless the FCC adopts a reasonable safe harbor rule." 852 F.2d at 1343, n.18.

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obviously, is not the ideal forum for determination of constitutional rights. It is even less so when the decisions are made on an *ad hoc* basis.

Absolute protection of children against any possible occasion of being exposed to speech regarded as unsuitable is not an appropriate goal. The pursuit of such an unreasonable goal would inevitably limit adults to receiving "only what is fit for children" *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957). The society does not pursue such absolutism in the goal of protecting children from dangers vastly more certain and damaging than any experienced from hearing indecent language. Every year large numbers of children are killed or maimed by automobiles. While this damage is reduced by the channeling of automobile use in ways that promote safety, the only way to ensure absolute protection would be to ban cars or abolish highways. Society will not accept such an absolute measure even to protect a substantial number of lives. Absolutism must similarly be avoided in addressing harms which are more speculative and minor in nature, particularly when the harm to be avoided is intertwined with an essential Constitutional liberty, the right of free speech.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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